

Attachments

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Attachment A – Appeal to USAC

E-COPERNICUS

November 5, 2014

Letter of Appeal

Rural Health Care Division
Universal Service Administrative Company
2000 L Street, NW Suite 200
Washington, DC 20036

To whom it may concern:

This is an appeal of the denial of HCP 14320, Jamestown Hospital FRN 1345715 (attached). The denial said "The HCP has not provided documentation to support the type of service and bandwidth...and has not responded to requests from RHCD for the required documentation." That is not correct. The request for documentation was posted on September 17, due September 24 (attached). The request did not pertain to type of service or bandwidth. One request, to confirm the fiber was lit, was already confirmed in the original submission. I logged in to respond to the urban rate request on September 19, but My Portal would not accept reply because the request was closed. Because USAC issued one request (not requests) for documentation and allowed but one day to reply, I request this FRN be reopened for documentation. Denial for failure to reply in one day and saying the HCP "has not responded to requests" when reply was blocked by My Portal seems heavy-handed and not a reasonable administrative process.

In correspondence with Carolyn McCornac as to why My Portal would not accept the requested documentation, she said dark fiber is ineligible in the telecommunications program. If that was the basis for denial, please issue a denial that explains that determination in reference to FCC rule(s) so it is clear what may be relevant to an appeal. Dark fiber is not mentioned on RHC's website or in FCC Orders pertaining to the telecommunications program. Prior to submitting this request, I confirmed with RHC customer service that there was no prohibition on dark fiber from an eligible telecommunications carrier in the telecommunications program.

Thank you for your prompt attention and resolution of this appeal.

Sincerely,

William England, Ph.D., J.D.
Senior VP for Health Care Networks
E-Copernicus
p301-776-9258
WEngland@E-Copernicus.com

cc: Lisa Jackson, Director, Jamestown Hospital Foundation
Greg Rohde, President, E-Copernicus

E-COPERNICUS

November 5, 2014

Supplement to Letter of Appeal - HCP 14320, Jamestown Hospital FRN 1345715

Rural Health Care Division
Universal Service Administrative Company
2000 L Street, NW Suite 200
Washington, DC 20036

To whom it may concern:

In the 1997 Universal Service Order, the FCC provided for the Rural Health Care Telecommunications Program to support, "telecommunications services necessary for the provision of health care services". In the 15th Order on Reconsideration of the Order, the FCC said, "we amend our rules to permit the Universal Service Administrative Company (USAC) to provide support for any commercially available telecommunications service, regardless of the bandwidth." Dark fiber was not mentioned and nothing in relevant FCC orders prohibits support of fiber leased from a telecommunications vendor that is lit and in use, but where the telecommunications vendor does not provide or charge for the equipment to light the fiber.

Until about 2007, the online Form 466 lacked an option to select "fiber", so all fiber was funded as "unspecified" service. Because there was no discussion, explanation or prohibition of dark fiber in the telecommunications program, some service submitted as "unspecified" or subsequently as "fiber" could have been fiber provided by a telecommunications vendor that was lit by the health care provider's equipment, as in this instance. In review of this appeal, we request USAC to review its records for any prior denial of dark fiber in the telecommunications program. If any other denials have occurred, please provide sufficient detail and reference to FCC policy or guidance on which denial was based, so we may understand if precedents in that situation apply in this case.

Because dark or unlit fiber was not discussed in the Universal Service Order, it was supported in the E-Rate program until 2004, when the Eligible Services List (ESL) changed from saying that "[s]ervice providers can lease fiber capacity that does not include modulating electronics...if the applicant provides the electronics to modulate the fiber" to "[t]he FCC has not resolved whether unlit dark fiber is a telecommunications service. Pending resolution of this issue, it is not eligible for funding." Because the question of whether dark fiber could be supported as a telecommunications service was not raised until 2004 and was only raised in the E-Rate program, the rural health care program remains in the same position as E-Rate prior to 2004, with no explicit FCC guidance or prohibition on support.

Although the controversy surrounding dark fiber in E-Rate might have raised policy questions about funding it in the rural health care program after 2004, that question was resolved by the Rural Health Care Pilot Order, which again did not mention dark fiber, in spite of the controversy in E-Rate 3 years earlier. As explained in Pilot Program FAQ#14 (see www.fcc.gov/encyclopedia/rural-health-care-pilot-program#faq14), consistent with section 254(h)(2)(A) of the 1996 Telecommunications Act, the Pilot program was “competitively neutral” to “not favor or disfavor one technology over another.” As clarified on a Pilot program applicant conference call, that meant dark fiber was supported, because it was not mentioned or prohibited in the Pilot Order.

Further support for the eligibility of dark fiber is found in “Reply Comments of Sunesys, Inc” (see <http://apps.fcc.gov/ecfs/document/view?id=6516087748> and attached), which explained that dark fiber provided by an eligible (common) telecommunications carrier should be eligible in E-Rate in spite of the change in the 2004 ESL. Sunesys cited aspects of the “Triennial Review Order”, the “Fourth Report and Order” and considerations in “Iowa v. FCC” to conclude that “the provision of end-to-end leased dark fiber service on a common carriage basis satisfies the definitional prerequisites of a telecommunications service”. The explanations provided by Sunesys apply equally to the rural health care telecommunications program except there was no FCC policy or guidance to imply that dark fiber had become ineligible.

Even if the 2004 ESL explanation that the FCC has not resolved if dark fiber is a telecommunications service does guide the rural health care program, that consideration was resolved by the FCC in the 2011 ESL, which said dark fiber could be supported in E-Rate and clarified that “Lit or dark fiber, provided by any entity, including a non-telecommunications carrier, is eligible. Dark fiber is eligible as long as applicants light the fiber immediately...When lit fiber is leased as telecommunications, the modulating electronics included as part of that service is eligible as telecommunications.” The ESL also clarified that “Supported telecommunications can be provided in whole or in part via lit or dark fiber by any entity, including non-telecommunications carriers.” Because the rural health care program can only support telecommunications, but not equipment or non-telecommunications carriers, the eligibility of equipment or non-telecommunications carriers in the ESL is not in question, but only whether a monthly fiber lease by a telecommunications “common” carrier to a health care provider that provides its own electronics, is eligible.

The ESL defined Telecommunications as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” Such is the case for Jamestown Hospital, which uses the fiber for a point to point connection between their computer system and an offsite backup storage system. The telecommunications carrier quoted a rate and leased the fiber on a month-to-month basis the same as they would lit fiber, with no up-front cost or IRU. The telecommunications carrier retained full ownership and control of the fiber connection, including maintenance.

Most recently, in the Healthcare Connect Fund Order (HCF), the FCC provided guidance similar to the ESL on support for dark fiber. Because the HCF program can fund capital construction and equipment and can support non-telecommunications carriers, it is not surprising the Commission clarified the limits of support for dark fiber in the HCF to parallel E-Rate. But the HCF discussion of dark fiber does not reference the telecommunications program. Contrary to the attached email from Carolyn McCornac, there seems no basis to conclude that support in HCF means there is not support in the telecommunications program, unless USAC has created such a policy. Nothing in the HCF Order discussion of dark fiber suggests it retroactively prohibited dark fiber in the telecommunications program, where in 15 years since the Universal Service Order, the FCC has not made or implied such prohibition. USAC's decision would mean the FCC must necessarily define dark fiber differently for E-Rate than for the rural health care program and has the administrator making a policy the Commission has not made.

Thank you for your prompt attention to this issue.

Sincerely,

William England, PhD, JD
Senior Vice President for Health Care Networks
E-Copernicus
p301-776-9258
WEngland@e-Copernicus.com

cc: Lisa Jackson, Director, Jamestown Hospital Foundation
Greg Rohde, President, E-Copernicus

Attachment B – USAC Denial

Administrator's Decision on Rural Health Care Program Appeal

Via Electronic and Certified Mail

March 28, 2016

Mr. Todd Hudspeth
Jamestown Hospital
2422 20th Street, SW
Jamestown, ND 58401

Re: Jamestown Hospital's Appeal of USAC's Funding Decision for Funding Year (FY)
2013 Funding Request Number (FRN) 1345715

Dear Mr. Hudspeth:

The Universal Service Administrative Company (USAC) has completed its review of the November 4, 2014 letter of appeal and November 5, 2014 supplemental letter of appeal submitted by William England, on behalf of Jamestown Hospital (Jamestown). The appeal requests that USAC reconsider the denial of funding for FY 2013 FRN 1345715 through the federal Universal Service Rural Health Care Telecommunications Program (RHC Telecom Program).

USAC has reviewed your appeal and the facts related to this matter, and determined that Federal Communications Commission (FCC) rules do not support reversing the denial of funding for FRN 1345715. For FY 2013, the RHC Telecom Program provided eligible health care providers (HCPs) support for eligible telecommunications services and Internet access. As explained further below, dark fiber has not been classified by the FCC as a telecommunications service or as Internet access and, thus, is not an eligible service through the RHC Telecom Program. Further, USAC is not authorized to waive FCC rules. Therefore, USAC is unable to grant this appeal.

Appeal Decision Explanation

The terms "lit fiber" and "fiber-based service" refer to fiber that is provisioned and lit (e.g., activated) by a service provider.¹ "Lit fiber" or "fiber based service" is eligible for support through the RHC Telecom Program.² The term "dark fiber" refers to fiber that is leased from

¹ See e.g., *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 22 FCC Rcd 16678, 16735, para. 120 (2012) (*Healthcare Connect Fund Order*).

² *Id.* at 16735, para. 121 ("HCPs are currently able to receive support for telecommunications services and Internet access services provided over such [service-provider lit] fiber....The Healthcare Connect Fund will continue to support broadband services provided over service provider-lit fiber.").

Mr. Todd Hudspeth
Jamestown Hospital
March 28, 2016
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a service provider and is activated using equipment that is provided by the customer.³ Although the FCC has acknowledged that “dark fiber is a ‘service’ that enhances access to advanced telecommunications and information services consistent with section 254(h)(2)(A) of the Act,”⁴ the FCC has not classified dark fiber as either a telecommunications service or as Internet access.⁵

On June 30, 2014, Jamestown submitted its FY 2013 FCC Form 466 requesting “Dark Fiber 1000 Mbps” from Dakota Central Telecommunications (Dakota Central) for FRN 1345715.⁶ To support its funding request, Jamestown provided a January 2014 invoice from Dakota Central for “dark fiber,” which included a handwritten note stating that the fiber was “lit by [Jamestown] owned equipment and connected to old hospital building which now serves as remote offsite backup storage location.”⁷ On September 24, 2014, USAC denied funding for FRN 1345715 because dark fiber is not an eligible service in the RHC Telecom Program.⁸

On November 4, 2014, Jamestown’s consultant submitted this appeal asserting that FCC rules for the RHC Telecom Program do not prohibit funding dark fiber that is provided by an eligible telecommunications carrier and is in use and lit by the customer.

While FCC rules and orders do not expressly discuss the eligibility of dark fiber in the RHC Telecom Program, FCC rules for FY 2013 provide that support under the RHC Telecom Program is limited to eligible telecommunications services and Internet access.⁹ Because the FCC has not classified dark fiber as a telecommunications service or as Internet access, the requested dark fiber for FRN 1345715 is not an eligible service that may be funded in the RHC Telecom Program.¹⁰

Jamestown further asserts that the denial of funding for FRN 1345715 is inconsistent with FCC orders finding that dark fiber is eligible for support through the Healthcare Connect Fund (HCF) Program, RHC Pilot Program, and the E-rate Program.¹¹ However, the HCF Program,

³ *Id.* at 16735, para. 120.

⁴ *Id.* at para. 123.

⁵ See, e.g., *Schools and Libraries Universal Service Support Mechanism et al.*, CC Docket No. 02-6 *et al.*, Sixth Report and Order, 25 FCC Rcd 18762, 18767, para. 9 (2010) (*Sixth Report and Order*) (“[D]ark fiber has not been classified as either a telecommunications service or Internet access.”).

⁶ FCC Form 466 for FRN 1345715 (June 30, 2014).

⁷ Dakota Central Telecommunications Invoice to Jamestown (Jan. 10, 2014).

⁸ Email from USAC to Jamestown (Sept. 24, 2014).

⁹ See 47 C.F.R. § 54.601(c)(1) (2012); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9106, paras. 627-28 (1997) (*1997 Order*) (clarifying that support under the RHC Telecom Program is limited to eligible telecommunications services provided by telecommunications carriers to eligible health care providers). USAC notes that starting with FY 2014, Internet access is no longer eligible for support through the RHC Telecom Program.

¹⁰ See *supra* n.5.

¹¹ See, e.g., *Healthcare Connect Fund Order*, 22 FCC Rcd at 16735-16738, paras. 122, 125-129; *Rural Health Care Support Mechanism*, WC Docket No. 02-60, 22 FCC Rcd 2555, 20397, para. 74 (2007); *Sixth Report and Order*, 25 FCC Rcd at 18766-67, para. 9.

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RHC Pilot Program, and the E-rate Program are separate federal universal service support mechanisms with different rules governing the eligibility of services and equipment. Therefore, the rules and orders for those support mechanism regarding eligible services do not govern the RHC Telecom Program rules for eligible services. Thus, the FCC's determinations that dark fiber is eligible for support under the other universal service support mechanisms does not support the argument that dark fiber is also eligible through the RHC Telecom Program. Further, in determining that dark fiber that has been lit is eligible for support through the HCF Program, the FCC explained that telecommunications services provided over service provider-lit fiber are currently eligible through the RHC Telecom Program. The FCC did not indicate it intended for dark fiber (i.e., not lit by the service provider) to also be eligible through the RHC Telecom Program.¹²

As the FCC has not classified dark fiber as a telecommunications service or as an Internet access, the requested dark fiber for FRN 1345715 is ineligible for support through the RHC Telecom Program. We also note that USAC cannot waive the FCC's rules to grant the requested relief.¹³

If you wish to appeal this decision or request a waiver, you can follow the instructions pursuant to 47 C.F.R. Part 54, Subpart I (47 C.F.R. §§ 54.719 to 725). Further instructions for filing appeals or requesting waivers are also available at:

<http://www.usac.org/about/about/program-integrity/appeals.aspx>

Sincerely,

/s/ Universal Service Administrative Company

cc: William England, e-Copernicus

¹² See *supra* n.2.

¹³ See generally 47 C.F.R. § 54.702(c) (2012) ("[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."); 47 C.F.R. § 1.3 (2012) ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedures Act and the provisions of this chapter.").

Attachment C – 2013 ESL – Telecommunications

	<p>A telecommunications service is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public...." All telecommunications carriers must be common carriers and are required by the Commission to file FCC Form 499A (<i>Telecommunications Reporting Worksheet</i>). Supported telecommunications services provided by telecommunications carriers include all commercially available telecommunications services.</p> <p><u>Telecommunications:</u> Supported telecommunications can be provided in whole or in part via lit or dark fiber by any entity, including non- telecommunications carriers. Telecommunications is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."</p> <p><u>Internet access.</u> If the applicant seeks Internet access, support will generally be available only for basic conduit access to the Internet. "Internet access" is defined in section 54.5 of the Commission's rules. Some Internet Access services may include features that are not themselves eligible, such as specialized content, caching services, and/or filtering services. In general, funding requests that provide only a single price for a product or service that contains both eligible and ineligible functionality are fully ineligible. However, cost allocation may be used to provide separate pricing for the eligible and ineligible components.</p>
Two-in-Five Rule	<p>The "<u>Two-in-Five Rule</u>" allows each eligible entity to obtain support for Internal Connections funding requests every two out of five years. This limitation applies only to Internal Connections and not to requests appropriately categorized as Telecommunications Services, Internet Access, or Basic Maintenance of Internal Connections.</p>
Wide Area Networks	<ul style="list-style-type: none"> • <u>WAN Restriction.</u> WANs cannot be built or purchased using E-rate support but WAN facilities may be leased. • <u>Lease of Wide Area Network Infrastructure.</u> Facilities that provide a Wide Area Network may be leased by applicants as a Priority One service. Limitations apply to the reimbursements that are available for initial implementation costs (leased equipment and its installation) of service provider infrastructure. The <u>Wide Area Network Fact Sheet</u> has further details about

Attachment D – Correspondence with USAC

Bill England

From: rhc-appeals [rhc-appeals@usac.org]
Sent: Wednesday, November 05, 2014 3:53 PM
To: Bill England; 'RHC-appeals@usac.org'
Cc: Gregory Rohde; ljackson@jrmcnd.com
Subject: RE: RHC FCC Form 466 Request for Support for HCP Number 14320 - LETTER OF APPEAL

Bill,

You are correct that it was related to dark fiber eligibility. We will provide more details on the denial shortly.

Ed

From: Bill England [mailto:wengland@e-copernicus.com]
Sent: Wednesday, November 05, 2014 1:42 PM
To: 'RHC-appeals@usac.org'
Cc: Gregory Rohde; ljackson@jrmcnd.com
Subject: FW: RHC FCC Form 466 Request for Support for HCP Number 14320 - LETTER OF APPEAL

Assuming this was denied because dark fiber was thought ineligible, please add this information to the file for FRN 1345715. Also attached is correspondence with Dakota Carrier Network (SPIN 143022264) concerning their rate for an actual dark fiber customer in Bismarck ND. I asked DCN if they could find and quote the rate for a dark fiber customer they have in Bismarck as a favor to Jamestown Hospital because Dakota Central does not serve an urban area and has no way to quote rates for an area they do not serve.

As I said, if the denial of this FRN was because dark fiber was thought ineligible, please provide a denial that details the basis for USAC's decision, so I know ^{what} may be relevant to appeal. I'm just reiterating what USAC already knows about dark fiber so it may not address specifics at issue with this FRN.

From: Bill England
Sent: Tuesday, November 04, 2014 11:48 PM
To: 'RHC-appeals@usac.org'
Cc: thudspeth@jrmcnd.com; Gregory Rohde
Subject: RE: RHC FCC Form 466 Request for Support for HCP Number 14320 - LETTER OF APPEAL

Please note that the SPIN for this FRN was incorrect on the Form 466. The vender is Dakota Central Telecom, SPIN 143002739. The contact, Lori Solberg (lsolberg@daktel.net), was correct on the 466 but the denial went to sarah.tuntland@sdncommunications.com, who is presumably USAC's contact for the incorrect SPIN. Why is correspondence to USAC's SPIN contact rather than the vender contact listed on Form 466?

From: rhc-assist@usac.org [mailto:rhc-assist@usac.org]
Sent: Wednesday, September 24, 2014 11:20 AM
To: thudspeth@jrmcnd.com; Gregory Rohde; kcdeboer@jrmcnd.com; Bill England; Carla; sarah.tuntland@sdncommunications.com
Subject: RHC FCC Form 466 Request for Support for HCP Number 14320

Health Care Provider (HCP) Name: Jamestown Hospital
HCP Number: 14320
Funding Request Number: 1345715
FCC Form 465 Application Number: 43136540

Funding Year: 2013

The Rural Health Care Division (RHCD) of the Universal Service Administrative Company (USAC) has reviewed the FCC Form 466 and supporting documentation submitted by the HCP referenced above. Based on the information provided, RHCD is unable to provide support for the following reason(s):

1. The HCP has not provided documentation to support the type of service and bandwidth entered on FCC Form 466, Line 17 and has not responded to requests from RHCD for the required documentation.

This letter is being sent to the HCP mailing contact, all account holders related to this circuit, and the contact at the HCP's physical location. In addition, a copy of this letter has been sent to the entity identified below as your selected telecommunications carrier.

Service Provider Name: South Dakota Network, LLC
Service Provider Identification Number (SPIN): 143002997

If you wish to appeal this decision, you may file an appeal with USAC. The appeal must be submitted to USAC within 60 days of the date of this letter. Detailed instructions for filing appeals are available at: <http://www.usac.org/rhc/about/program-integrity/appeals.aspx>. Parties seeking waivers of FCC rules can appeal directly to the FCC. See 47 CFR Sections 54.719 and 720.

The information contained in this electronic communication and any attachments and links to websites are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, or the person responsible for delivering this communication to the intended recipient, be advised you have received this communication in error and that any use, dissemination, forwarding, printing or copying is strictly prohibited. Please notify the sender immediately and destroy all copies of this communication and any attachments.

Bill England

From: Carolyn McCornac [cmccornac@usac.org]
Sent: Wednesday, September 24, 2014 7:13 AM
To: Bill England
Cc: Gregory Rohde
Subject: RE: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

Bill,
Dark Fiber is considered equipment or hardware for the Telecom program, and therefore not eligible for funding.

You may appeal the funding denial letter when you receive it.

Thanks,
Carolyn McCornac
(202) 263-1607
cmccornac@usac.org | www.usac.org

From: Bill England [mailto:wengland@e-copernicus.com]
Sent: Tuesday, September 23, 2014 12:35 PM
To: Carolyn McCornac
Cc: Gregory Rohde
Subject: RE: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

Correction....I left the word "not" out in the last paragraph regarding HCF.

From: Bill England
Sent: Tuesday, September 23, 2014 12:26 PM
To: 'Carolyn McCornac'
Cc: Gregory Rohde
Subject: RE: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

Dear Carolyn,

Dark Fiber is explicitly covered in HCF but I don't think it was mentioned in any Primary program rules or policies. Do you have a reference? The Primary Program was created to cover "telecommunications services to eligible health care providers". The Universal Service Order did not delineate specific services other than initially limiting support to T-1 or less. That restriction was lifted in the 15th Order when the FCC found that "allowing rural health care providers to choose the transmission speeds necessary for health care services in rural areas, outweighs our need to determine with certainty the required bandwidth." So the fact that dark fiber is not mentioned does not mean it is not covered.

Much controversy over dark fiber took place in E-Rate, where it was covered until 2004 when the FCC updated the Eligible Services List to say dark fiber was not supported because "The FCC has not resolved whether unlit dark fiber is a telecommunications service. Pending resolution of this issue, it is not eligible for funding." After several years of non-coverage, the ESL was update to say dark fiber would be supported as telecommunications service if it was used for telecommunications or as Internet service if used for Internet. (See 2013 ESL). The ESL further quoted the Telecommunications Act of 1996 to say telecommunications is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" noting that "Dark fiber is eligible as long as applicants light the fiber immediately."

Applicants in the Pilot project received support for dark fiber although it was not explicitly mentioned in the Pilot Order, because it was considered to be within the class of services eligible for support in Para 74 and was not mentioned among services listed as ineligible for support in Para 75. In this case, Jamestown Hospital is leasing dark fiber from a competitive local exchange carrier to connect the hospital to a backup computer center (in their old hospital building) for offsite record storage, using their own interface to light the fiber. It is being used for "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received", so would appear to meet the definition of telecommunications provided by the Act. Thus, because it meets the definition of telecommunications and is not prohibited, it would seem to be covered. That was the decision in the Pilot program and the FCC simply clarified it and provided some conditions in HCF to insure that networks did NOT build and bank dark fiber, as they might if requirements were not included. Because Primary cannot build services, that is pretty much a non-issue for leased service.

Please let me know if you need further documentation or explanation of Jamestown Hospital's lease of dark fiber to communicate with its backup computer center.

Bill
301-776-9258

From: Carolyn McCornac [<mailto:cmccornac@usac.org>]
Sent: Friday, September 19, 2014 3:54 PM
To: Bill England
Subject: FW: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

Hi Bill,

This may be a non-issue. Dark Fiber is not eligible for funding in the Telecom program.

Dark Fiber is eligible in the HCF program, under certain conditions.

Thanks,
Carolyn McCornac
(202) 263-1607
cmccornac@usac.org | www.usac.org

From: RHC-Assist
Sent: Friday, September 19, 2014 9:14 AM
To: Chris Neto
Cc: Genie Wong; Carolyn McCornac
Subject: FW: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

FYI.

From: Bill England [<mailto:wengland@e-copernicus.com>]
Sent: Friday, September 19, 2014 12:47 AM
To: RHC-Assist
Cc: thudspeth@jrmcnd.com; Gregory Rohde; Carla
Subject: RE: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

Dear USAC,

I'm not sure what happened with this request. While I was working on a reply offline last evening, the status changed from pending to closed. The request now says: Form review was completed. So the system changed information request status to closed. However, "My forms" still shows "in review", so it does not appear review is completed. There is no longer a button for reply. I discussed USAC's documentation needs (again) with the carrier and have a meeting planned with their back office to brainstorm on what they can provide. This carrier does not serve an urban area and are perplexed about quoting an urban rate for service they cannot provide. I am also unclear why my annotated tariff document that matched bandwidth, term and equivalency on service, was insufficient. Unless we pretend to seek a bid for dark fiber at a fictitious urban address...this is not information urban vendors give out. A request to verify this fiber was lit (listing the wrong FRN) was also closed by the system without my reply. That was verified in the original documentation.

Please let me know the status of this review and acceptance of the tariff information. The carrier and I have already spent hours on the request for more documentation and I will stop if you can use what was submitted.

-----Original Message-----

From: rhc-donotreply@usac.org [mailto:rhc-donotreply@usac.org]

Sent: Wednesday, September 17, 2014 3:30 PM

To: thudspeth@jrmcnd.com; Gregory Rohde; Bill England; Carla

Subject: RHC FCC Form 466 for HCP 14320 - immediate ACTION REQUIRED to process

Health Care Provider (HCP) Name: Jamestown Hospital

HCP Number: 14320

FCC Form 465 Application Number: 43136540

Funding Request Number: 1345715

Service Type: Other

Funding Year: 2013

The Rural Health Care (RHC) division of the Universal Service Administrative Company (USAC) has received the FCC Form 466 submitted by the HCP referenced above. However, RHC cannot process the form without information for FRN 1345715. To view and respond to the request for information, log into My Portal (<https://rhc.usac.org/rhc/>), go to Information Requested on the My Documents tab, and click on the "Request Type" hyperlink. Click on "Submit Response" to submit the information requested. Any account holder will be able to respond to an Information Request; once it has been completed, the request is removed from the Information Requests section and the information provided will be saved to your My Documents folder.

The information requested is required to process the above referenced form, and must be submitted to RHC within two weeks of the date of this notification or the HCP will risk losing funding.

Do not reply to this email - RHC does not monitor this account. For questions or assistance about the information request, contact the RHC Help Desk at 1.800.229.5476 or click on the "Contact RHC Help Desk" link in My Portal.

The information contained in this electronic communication and any attachments and links to websites are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, or the person responsible for delivering this communication to the intended recipient, be advised you have received this communication in error and that any use, dissemination, forwarding

Attachment E – Reply Comments of Sunesys, Inc

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Schools and Libraries Universal Service)	
Support Mechanism)	CC Docket No. 02-6
)	
)	

REPLY COMMENTS OF SUNESYS, INC.

I. INTRODUCTION

Sunesys, Inc.'s ("Sunesys") Reply Comments set forth the legal and policy bases to justify the Commission's continuation of deeming dark fiber to be eligible for discounts under the Universal Service Support Mechanism for Schools and Libraries (commonly known as "E-Rate"). As Sunesys explained in its Initial Comments, as a competitive local exchange carrier ("CLEC"), Sunesys has leased end-to-end dark fiber service to numerous school E-rate beneficiaries for telecommunications and Internet access, in accordance with program rules. It is patently unfair, from procedural and substantive legal standpoints, and it violates the technical neutrality cornerstone of universal service policy, to suddenly reverse course, and deem dark fiber to be ineligible for E-rate discounts.

Sunesys has been the successful bidder of telecommunications and Internet access services for numerous E-rate beneficiaries. In numerous instances, the E-rate applicant has signed multi-year agreements to lease lit or unlit fiber service, in order to obtain telecommunications and/or Internet access service. Consequently, the Commission's decision in the Further Notice of Proposed Rulemaking to solicit comments on the issue of whether dark

fiber service should be eligible for E-rate discounts unnecessarily has injected a level of uncertainty where none previously existed, and where none need exist.

More immediately, the Commission imposed a great deal of uncertainty by requiring the Fund Administrator to itemize dark fiber as ineligible for discounts for Fund Years 2004 and beyond since, according to the SLD, the FCC has not yet determined whether unlit dark fiber is a telecommunications service.¹ This determination completely fails to take into account that dark fiber is used not only for telecommunications transmission, but also serves as a means of providing Internet access. At a minimum, therefore, dark fiber should have remained eligible under the Internet access basket of services.

II. END-TO-END LEASED DARK FIBER SERVICE CONSTITUTES TELECOMMUNICATIONS SERVICE UNDER THE TELECOMMUNICATIONS ACT OF 1996 WHEN THE SERVICE IS PROVIDED ON A COMMON CARRIAGE BASIS.

The provision of dark fiber, end to end service, which enables a school or library to transmit communications and/or to obtain access to the Internet, constitutes a telecommunications service under the Telecommunications Act of 1996 (“the Act” or “TA-96”) when the service is provided by a common carriage basis.

The first step of this analysis is to define what is meant by dark fiber service. Borrowing from Newton’s Telecomm Dictionary, and in the context of evaluating unbundled network elements, the FCC has defined dark fiber in the following manner:

Dark fiber is optical fiber through which no light is transmitted and no signal is carried. It is unactivated deployed fiber that is left dark, *i.e.*, with no necessary equipment, *i.e.*, “opto-electronics” or “optronics” attached to light the fiber to carry a signal to serve customers. *See* NEWTON’S TELECOM DICTIONARY 201 (18th ed. 2002) (definition of Dark Fiber); *see also* *UNE Remand Order*, 15 FCC Rcd at 3771, para. 162 n.292. Once the optronics are attached to the fiber to make signal transmission

¹ SLD’s Eligible Services List, <http://www.sl.universalservice.org/data/pdf/EligibleServicesList101003.pdf>

possible the dark fiber becomes "lit." See NEWTON'S TELECOM DICTIONARY 538-39 (18th ed. 2002) (definition of Opto-Electronics and Optronics).

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (released August 21, 2003) at ¶201 n. 628 ("Triennial Review Order").

The way in which Sunesys provides leased dark fiber service to E-rate beneficiaries is through an end-to-end service. Sunesys installs and operates all of the fiber transmission facilities, and the applicant installing and operating the electronic component(s) that are attached to the fiber in order to light the fiber. The sole difference between Sunesys's dark and lit fiber service is determined by whether Sunesys or the end user provides the electronics that are used to light the fiber facilities.

The second step in the analysis is to determine whether leased dark fiber service meets the definition of "telecommunications" under TA-96. The definition of telecommunications under the Act is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153.

The FCC already has found that dark fiber constitutes a communication service provided over wires:

We find that the BOCs' provision of dark fiber service is 'wire communication' as defined by the Act. The Act's definition of "wire communication" is "far-reaching" and clearly encompasses any carrier offering which permits the transmission of information between two or more points by means of electronic communications facilities, including all instrumentalities, facilities, apparatus, and services incidental to such transmission. Dark fiber service permits the transmission of information, by other like connection, between two or more customer premises (using customer-provided electronics). Accordingly, we find that dark fiber service clearly fits within the category of "transmission . . . by wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission," and thus constitutes 'wire communication' under the Act.

In re Southwestern Bell Telephone Company; US West Communications; Bell Atlantic Telephone Companies; BellSouth Telephone Companies, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2600, File No. W-P-C 6670 *et seq.*, FCC 93-165 (March 29, 1993).²

The operative part of the definition of wire communication, upon which the FCC relied in 1993 to rule that dark fiber is a communications service, and the definition of “telecommunications” under TA-96 is the same: the transmission of information of the user’s information between different points. The FCC’s finding that dark fiber service is a form of wire communications service governs the conclusion that dark fiber is a form of telecommunication service.

The FCC also reached a similar conclusion in its Order addressing the collocation requirements applicable to cross-connections. In *re Deployment of Wireline Services Offering Advanced Telecommunications Capability, Fourth Report and Order*, CC Docket No. 98-147, 16 FCC Rcd 15435, FCC 01-204 (released August 8, 2001), ¶75. There, the FCC found that dark fiber service with respect to cross-connects constitutes a telecommunications service subject to Title II common carrier regulation. *Id.* at n.189. The cross-connection service under review was “ ‘[a] connection scheme between cabling runs, subsystems, and equipment using patch cords or jumpers that attach to connecting hardware on each end.’ ” *Id.*, quoting Newton’s Telecom Dictionary. In other words, the connection of various dark fiber facilities was viewed as a communications service, and the FCC also applied common carriage requirements to deem the service a form of telecommunications service.

The third step of this analysis is to determine whether dark fiber service constitutes a telecommunication service. The key precept of a telecommunications service is

² The Court’s remand of the Commission’s Declaratory Ruling focused NOT on whether dark fiber was a communications service, but rather whether the service was offered on a common carriage basis. The Commission’s conclusion, that dark fiber is a wire communications service, therefore remains intact.

that the service is offered on a common carriage basis, *i.e.*, the provision of telecommunications is undertaken “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. §153 (46). *See also* Federal-State Joint Board on Universal Service, *Report & Order*, 12 FCC Rcd 8776, 9177 P 785 (1997). The Court of Appeals for the District of Columbia Circuit has ruled that the critical aspect of common carriage is that a carrier must hold itself out indiscriminately to serve all users, or all users within a class of users. *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000). In *Iowa*, the Circuit Court confirmed that the FCC’s interpretation of the term “telecommunications carrier” to be synonymous with “common carrier” is a “reasonable construction of an ambiguous statutory term.” *Id.* at 757-58. The D.C. Circuit remanded the FCC’s declaratory order which found that the Iowa Communications Network was not a common carrier, in order for the Commission to address the Network’s claim that it provided service to end users that it was statutorily authorized to serve.

On remand, the FCC concluded that ICN was a common carrier, because ICN offers to serve all end users within the class of users that it is statutorily restricted to serve, and provides service that allows users to transmit information of their own choosing. Federal-State Joint Board on Universal Service, *Order on Remand*, 16 F.C.C.R. 571, 574 (2000). On appeal brought by the United States Telecom Association, the D.C. Circuit affirmed the FCC’s decision. *United States Telecom Ass’n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002).

The provision of end-to-end leased dark fiber service on a common carriage basis satisfies the definitional prerequisites of a telecommunications service. When leased dark fiber service is offered by a CLEC, such as Sunesys, on a tariffed basis that is available indiscriminately to the public, the service constitutes the provision of telecommunications by a common carrier, and therefore, should be eligible for discounts under the E-rate program.

Concomitantly, the provision of dark fiber service by a company that does not operate on a common carriage basis should not be classified as an eligible telecommunications service under the E-rate program.

III. PUBLIC POLICY CONSIDERATIONS FURTHER SUPPORT THE CLASSIFICATION OF END-TO-END LEASED DARK FIBER SERVICE AS AN ELIGIBLE SERVICE FOR E-RATE DISCOUNTS.

As Sunesys described in its Initial Comments, it is extremely unfair and disruptive for the FCC to reverse course and no longer deem dark fiber service as an eligible telecommunications service. Fibertech Networks, LLC's Comments cogently describe the detrimental effects of the Commission's recent decision to no longer provide discounts on dark fiber service:

Many schools have come to rely on dark fiber services as an efficient, cost-effective solution for their communications needs. Choice, flexibility, and certainty are important aspects of the E-rate program. The decision to eliminate dark fiber as an eligible service has undermined these key components of the E-rate program. Without dark fiber as an eligible service, schools and libraries have fewer choices in service providers, less flexibility in product offerings for both current and future advanced communications needs, and face debilitating uncertainty with respect to existing and future service arrangements.

Fibertech Comments at 3.

Schools and libraries should have the continued flexibility to choose among various technologies to obtain access to telecommunications services and to the Internet. Dark fiber service may constitute the lowest cost option that should remain available to applicants. Certainly under section 254(h), the Commission has the authority to deem dark fiber service as an adjunct to Internet access or high speed telecommunications services, and classify the service as eligible for discounts under the priority one category of services.

Just like lit fiber or copper facilities, dark fiber is a conduit used for transmission of telecommunications or for Internet access. There is no reason to discriminate against dark fiber in favor of lit fiber or other technologies that are used as a means of providing telecommunications service and Internet access.

IV. CONCLUSION

End-to-end leased dark fiber service that is provided by a common carrier indiscriminately to users should be designated as a telecommunications service that is eligible for E-rate discounts. Alternatively, end-to-end leased dark fiber service may be classified as an Internet access service that is eligible for priority one services.

Respectfully submitted,

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